



6355-01-M

## CONSUMER PRODUCT SAFETY COMMISSION

(CPSC Docket No. 13-C0001)

Aqua-Leisure Industries, Inc., Provisional Acceptance of a Settlement Agreement and Order

AGENCY: Consumer Product Safety Commission

ACTION: Notice

SUMMARY: It is the policy of the Commission to publish settlements which it provisionally accepts under the Consumer Product Safety Act in the Federal Register in accordance with the terms of 16 CFR 1118.20(e). Published below is a provisionally-accepted Settlement Agreement with Aqua-Leisure Industries, Inc., containing a civil penalty of \$650,000.00, within twenty (20) days of service of the Commission's final Order accepting the Settlement Agreement.

DATES: Any interested person may ask the Commission not to accept this agreement or otherwise comment on its contents by filing a written request with the Office of the Secretary by (insert date that is 15 calendar days from publication date).

ADDRESSES: Persons wishing to comment on this Settlement Agreement should send written comments to the Comment 13-C0001, Office of the Secretary, Consumer Product Safety Commission, 4330 East West Highway, Room 820, Bethesda, Maryland 20814-4408.

FOR FURTHER INFORMATION CONTACT: Jennifer W. Feinberg, Trial Attorney, Division of Compliance, Office of the General Counsel, Consumer Product Safety Commission, 4330

East West Highway, Bethesda, Maryland 20814-4408; telephone (301) 504-7843.

SUPPLEMENTARY INFORMATION: The text of the Agreement and Order appears below.

October 12, 2012

(Date)

Todd A.

Stevenson

Secretary

**UNITED STATES OF AMERICA  
CONSUMER PRODUCT SAFETY COMMISSION**

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CPSC Docket No.: 13-C0001

In the Matter of: )  
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 Aqua-Leisure Industries, Inc. )  
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## **SETTLEMENT AGREEMENT AND ORDER**

1. In accordance with 16 C.F.R. § 1118.20, Aqua-Leisure Industries, Inc. (“Aqua Leisure”) and staff (“Staff”) of the United States Consumer Product Safety Commission (“Commission” or “CPSC”) hereby enter into this Settlement Agreement (“Agreement”) under the Consumer Product Safety Act (“CPSA”), 15 U.S.C. §§ 2051-2089. The Agreement and the attached Order resolve Staff’s allegations set forth below.

THE PARTIES

2. Staff is the staff of the Commission, an independent federal regulatory agency established pursuant to, and responsible for, enforcement of the CPSA.

3. Aqua Leisure is a privately-held company, organized and existing under the laws of the state of Massachusetts, with its principal office located at 525 Bodwell Street, Avon, Massachusetts 02322-1098.

## STAFF ALLEGATIONS

4. The Subject Products are “consumer products” and, at all relevant times, Aqua Leisure was a “manufacturer” of “consumer products,” which were “distribute[d] in commerce,” as those terms are defined or used in sections 3(a)(5), (8), and (11) of the CPSA, 15 U.S.C. § 2052(3)(a)(5), (8), and (11).

5. The Subject Products are defective because the leg straps in the seat of the inflatable baby boat can tear with normal use, causing children to unexpectedly fall into or under the water, posing a risk of drowning.

6. Aqua Leisure received its first complaint of sudden tearing of the seat crotch of certain models of its inflatable baby boats in 2001, and announced a recall of 90,000 of those boats on November 28, 2001 (the “2001 Recall”). The 2001 Recall disclosed that Aqua Leisure and CPSC had received 12 reports of sudden tearing of the seat, including four reports that children were submerged completely under water before a caregiver was able to rescue the child.

7. For two years following the July 2001 recall, Staff monitored Aqua Leisure’s execution of its Corrective Action Plan. On July 14, 2003, Staff notified Aqua Leisure of its decision to close the case, but reserved the right to reopen the matter if Staff determined that the public had not been adequately protected from the risk of injury presented by the product. Staff further advised that Aqua Leisure had a “continuing obligation to inform the Commission of defects associated with this product....”

8. After the 2001 Recall, the Firm continued to produce different versions of the inflatable baby boats, which also became the subject of consumer complaints. Between December 2002 and June 2009, Aqua Leisure distributed approximately 4 million of these inflatable baby boats (“Subject Products”) in U.S. commerce. The Subject Products came in 18 different models, and sold for approximately \$8 to \$15 each through nationwide retailers.

9. Between July 14, 2003, and July 31, 2006, Aqua Leisure became aware of 17 incidents in which these post-2001 Recall inflatable baby boat seats “fell out”; “ripped”; “failed”; “tore”; “split”; and/or “separated,” including four incidents in which a baby boat seat ripped, causing children to fall into the water unexpectedly.

10. By July 2006, Aqua Leisure had information that the leg straps of the Subject Products were not being produced in accordance with the width and thickness specifications of the replacement product that had been evaluated by Staff as a part of the 2001 Recall and Corrective Action Plan.

11. In August 2008, Aqua Leisure senior executives raised concerns internally about a “potential problem” with the Subject Products, and began investigating the Subject Products and contemplating its obligation to report and the possibility of enforcement action by the CPSC. Aqua Leisure did not report to the CPSC at that time, however.

12. On October 31, 2008, CPSC Staff notified Aqua Leisure of an incident involving a 6-month-old girl who was completely submerged in a pool when the bottom of her inflatable baby boat seat “broke completely.” However, Aqua Leisure had previously received notice of this incident on July 25, 2008 yet the firm took no steps to report to the CPSC.

13. In addition, by October 31, 2008, Aqua Leisure was aware of at least 24 consumer complaints regarding the seats of the Subject Products since the 2001 Recall, including nine reports in which children fell through the Subject Products suddenly and were completely submerged underwater.

14. Aqua Leisure waited until March 12, 2009 to report to the CPSC, just hours before the publication of a news story by a Boston news team about problems with the Subject Products and Aqua Leisure’s handling of complaints and potential failure to report to the Commission.

15. Aqua Leisure’s initial report to the Commission on March 12, 2009, and its subsequent Full Report on April 17, 2009, incorrectly reported the scope and severity of the

hazard: both reports identified only four incidents and only one model of boat affected by the potential problem, instead of the actual 28 complaints received for 18 different models.

16. On May 21, 2009, Aqua Leisure filed a Supplemental Full Report in which it reported that the Firm had received at least 28 consumer complaints regarding 18 different models of baby boats.

17. On July 2, 2009, Aqua Leisure announced a recall for the Subject Products. The recall disclosed 31 reports of inflatable baby boat seats tearing, causing children to fall into or under the water.

18. Although well before May 21, 2009, Aqua Leisure had obtained sufficient information to reasonably support the conclusion that the Subject Products contained a defect that could create a substantial product hazard, or created an unreasonable risk of serious injury or death, Aqua Leisure failed to inform the Commission immediately of such defect or risk, as required by sections 15(b)(3) and (4) of the CPSA, 15 U.S.C. § 2064(b)(3) and (4). In failing to inform the Commission immediately of the defect or advising that the defect involved the Subject Products, Aqua Leisure knowingly violated section 19(a)(4) of the CPSA, 15 U.S.C. § 2068(a)(4), as the term “knowingly” is defined in section 20(d) of the CPSA, 15 U.S.C. § 2069(d).

19. Pursuant to section 20 of the CPSA, 15 U.S.C. § 2069, Aqua Leisure is subject to civil penalties for its knowing failure to report, as required under section 15(b) of the CPSA, 15 U.S.C. § 2064(b).

#### RESPONSE OF AQUA LEISURE

20. The Firm denies staff’s allegations that it knew that the Subject Products contained defects which could create a substantial product hazard pursuant to section 15(a) of the

CPSA, 15 U.S.C. 2064(a), and further denies that it knowingly violated the reporting requirements of section 15(b) of the CPSA, 15 U.S.C. 2064(b).

21. Like all inflatable pool toys, the Subject Products degrade over time. Section 1115.6 of Title 16 of the Code of Federal Regulations directs the Commission to consider, among other things, “the level of exposure of consumers to the risk” before determining that a reportable product defect exists. The reported failure rate for Subject Product leg straps was 0.0000063%. Of millions of units sold, Aqua Leisure received only 6 consumer reports (including suspect reports) in 2004, only 2 reports in 2005, only 7 reports in 2006, 3 in 2007, and 5 in 2008. The number of substantiated injuries is zero.

22. In addition, Section 1115.4 of title 15 of the Code of Federal Regulations requires the Commission to “consider, as appropriate: ... the adequacy of warnings and instructions to mitigate such risk” before it determines that a product is defective. Each baby boat is accompanied by a warning that instructs parents to supervise their children, as follows: “This is not a life saving device. Do not leave child unattended while in use. Only to be used in water in which the child is within its depth and under adult supervision. NEVER leave a child unattended. DO NOT overinflate or use high pressure air to inflate. Under NO circumstances should a child be left in or around water unless a competent adult swimmer is present supervising the child. DO NOT use with a baby who cannot sit confidently. The possibility DOES exist that a baby could tip the unit over. To reduce the risk of this happening, the water must be deep enough so that the baby cannot touch the bottom. Always exercise caution when babies are teething as they could puncture the baby boat. Do not give any playing accessories that have the potential to damage this product. Not suitable for children under 6 months.” For these reasons, Aqua Leisure did not believe the leg straps tears were reportable events under Section 15(b).

## AGREEMENT OF THE PARTIES

23. For purposes of this Agreement, as a manufacturer of consumer products distributed in U.S. commerce, Aqua Leisure is subject to the Commission's jurisdiction.

24. In settlement of Staff's allegations, Aqua Leisure consents to the entry of the attached Order ("Order") as set forth below, and will pay a civil penalty in the amount of six hundred fifty thousand dollars (\$650,000.00) (the "Settlement Amount"), two hundred fifty thousand (\$250,000.00) of which will be paid within twenty (20) days of the date this Order becomes final, and the remaining four hundred thousand (\$400,000.00) of which will be paid within one hundred twenty (120) days of the date this Order becomes final. The payment shall be made to the CPSC via [www.pay.gov](http://www.pay.gov).

25. Aqua Leisure warrants that it has reviewed its financial situation and that it currently is solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(1)(B)(ii)(I), and shall remain solvent following payment to the United States of the Settlement Amount. Further, the parties warrant that, in evaluating whether to execute this Agreement, they (a) have intended that the mutual promises, covenants, and obligations set forth constitute a contemporaneous exchange for new value given to Aqua Leisure, within the meaning of 11 U.S.C. § 547(c)(1), and (b) conclude that these mutual promises, covenants and obligations do, in fact, constitute such contemporaneous exchange. Further, the parties warrant that the mutual promises, covenants, and obligations set forth herein are intended to, and do, in fact, represent a reasonably equivalent exchange of value that is not intended to hinder, delay, or defraud any entity to which Aqua Leisure was or became indebted to on or after the date of transfer, within the meaning of 11 U.S.C. §548(a)(1).



26. If within 91 days of the effective date of this Agreement or of any payment made under this Agreement, Aqua Leisure commences, or a third party commences, any case, proceeding, or other action under any law relating to bankruptcy, insolvency, reorganization, or relief of debtors (a) seeking to have any order for relief of Aqua Leisure's debt's, or seeking to adjudicate Aqua Leisure as bankrupt or insolvent; or (b) seeking appointment of a receiver, trustee, custodian, or other similar official for Aqua Leisure or for all or any substantial part of Aqua Leisure's assets, Aqua Leisure agrees as follows:

- a. Aqua Leisure's obligations under this Agreement may not be avoided pursuant to 11 U.S.C § 547, and Aqua Leisure shall not argue or otherwise take the position in any such case, proceeding, or action that: (i) Aqua Leisure's obligations under this Agreement may be avoided under 11 U.S.C. § 547; (ii) Aqua Leisure was insolvent at the time this Agreement was entered into, or became insolvent as a result of the payment made to the United States; or (iii) mutual promises, covenants, and obligations set forth in this Agreement do not constitute a contemporaneous exchange for new value given to Aqua Leisure.
- b. If Aqua Leisure's obligations under this Agreement are avoided for any reason, including, but not limited to, through the exercise of a trustee's avoidance powers under the Bankruptcy Code, the United States, at its sole option, may rescind the releases in this Agreement and bring any civil and/or administrative claim, action or proceeding against Aqua Leisure. Aqua Leisure agrees that (i) any such action or proceeding brought by the United States seeking payment according to the Order set forth herein are enforcement actions that are not subject to an "automatic stay" pursuant to 11 U.S.C. § 362(a) as a result of the action, case or

proceedings described in the first clause of this Paragraph and Aqua Leisure shall not argue or otherwise contend that the United States' action or proceeding is subject to an automatic stay and therefore barred; (ii) Aqua Leisure shall not plead, argue or otherwise raise any defenses under the theories of statute of limitations, laches, estoppels, or similar theories, to any such civil or administrative claims, actions or proceedings that are brought by the United States within 10 calendar days of written notification to Aqua Leisure that the releases have been rescinded pursuant to this Paragraph; and (iii) the United States has a valid claim against Aqua Leisure in the amount of \$1.875 million and the United States may pursue its claim in the case, action or proceeding referenced in the first clause of this Paragraph, as well as in any other case, action or proceeding.

- c. The agreements in Paragraphs 26(a) and 26(b) shall apply only when the circumstances described in Paragraph 26 exist. Aqua Leisure acknowledges that the agreements, restrictions and claim enhancements in this Paragraph are provided in exchange for valuable consideration provided in this Agreement.

27. The parties further agree that if Aqua Leisure fails to make timely payments as agreed to in paragraph 24, such conduct will be considered a violation of this Agreement and Order.

28. Subject to Paragraphs 12 and 13, above, the Agreement is a full and complete resolution between Staff and Aqua Leisure, and its parents, shareholders, divisions, subdivisions, subsidiaries, partners, sister companies and their successors and assigns of all claims for civil penalties that have been or could have been asserted based on the facts contained in Staff's allegations above.

29. The parties enter into this Agreement for settlement purposes only. The Agreement does not constitute an admission by Aqua Leisure, or a determination by the Commission, that Aqua Leisure violated the CPSA's reporting requirements.

30. Upon provisional acceptance of the Agreement by the Commission, the Agreement shall be placed on the public record and published in the Federal Register, in accordance with the procedures set forth in 16 C.F.R. § 1118.20(e). If the Commission does not receive any written request not to accept the Agreement within fifteen (15) calendar days, the Agreement shall be deemed finally accepted on the 16th calendar day after the date it is published in the Federal Register, in accordance with 16 C.F.R. § 1118.20(f).

31. Upon the Commission's final acceptance of the Agreement and issuance of the Order, Aqua Leisure knowingly, voluntarily, and completely waives any rights it may have in this matter to the following: (a) an administrative or judicial hearing; (b) judicial review or other challenge or contest of the Commission's actions; (c) a determination by the Commission of whether Aqua Leisure failed to comply with the CPSA and the underlying regulations; (d) a statement of findings of fact and conclusions of law; and (e) any claims under the Equal Access to Justice Act.

32. The Commission may publicize the terms of the Agreement and the final Order.

33. The Agreement and the final Order shall apply to, and be binding upon, Aqua Leisure, and each of its successors and/or assigns, until the obligation described in paragraph 24 has been fulfilled.

34. The Commission issues the final Order under the provisions of the CPSA, and a violation of the final Order may subject Aqua Leisure, and each of its successors and/or assigns, to appropriate legal action.

35. The Agreement may be used in interpreting the final Order. Understandings, agreements, representations, or interpretations apart from those contained in the Agreement and the Order may not be used to vary or contradict the terms or the Agreement and the final Order. The Agreement shall not be waived, amended, modified, or otherwise altered without written agreement thereto, executed by the party against whom such waiver, amendment, modification, or alteration is sought to be enforced.

36. If any provision of the Agreement or the final Order is held to be illegal, invalid, or unenforceable under present or future laws effective during the terms of the Agreement and the final Order, such provision shall be fully severable. The balance of the Agreement and the final Order shall remain in full force and effect, unless the Commission and Aqua Leisure agree that severing the provision materially affects the purpose of the Agreement and final Order.

37. This Agreement may be signed in counterparts.

AQUA-LEISURE INDUSTRIES, INC.

Dated: 8/21/12

By: \_\_\_\_\_  
Steven Berenson, CEO  
Aqua-Leisure Industries, Inc.

Dated: 8/21/12

By: \_\_\_\_\_  
George Gigounas, Esq.  
Counsel to Aqua-Leisure Industries, Inc.  
DLA Piper  
San Francisco, CA

U.S. CONSUMER PRODUCT SAFETY COMMISSION STAFF

Cheryl A. Falvey  
General Counsel

Mary B. Murphy  
Assistant General Counsel  
Division of Compliance

Dated: 9/19/12

By: \_\_\_\_\_

Jennifer W. Feinberg  
Trial Attorney  
Division of Compliance  
Office of the General Counsel

**UNITED STATES OF AMERICA  
CONSUMER PRODUCT SAFETY COMMISSION**

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In the Matter of:

Aqua-Leisure Industries, Inc.

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CPSC Docket No.: 13-C0001

**ORDER**

Upon consideration of the Agreement entered into between Aqua-Leisure Industries, Inc. (“Aqua Leisure”), and U.S. Consumer Product Safety Commission (“Commission”) staff, and the Commission having jurisdiction over the subject matter and over Aqua Leisure, and it appearing that the Agreement and the Order are in the public interest, it is

**ORDERED** that the Agreement be, and is, hereby, accepted; and it is

**FURTHER ORDERED**, that Aqua Leisure shall pay a civil penalty in the total amount of six hundred fifty thousand dollars (\$650,000.00), with two hundred fifty thousand dollars (\$250,000.00) paid within twenty (20) days of service of the Commission’s Order upon counsel for Aqua Leisure, and the remaining four hundred thousand (\$400,000.00) paid within one hundred twenty (120) days of service. The payments shall be made electronically to the CPSC via [www.pay.gov](http://www.pay.gov). Upon the failure of Aqua Leisure to make the foregoing payments when due, interest on the unpaid amount shall accrue and be paid by Aqua Leisure at the federal legal rate of interest set forth at 28 U.S.C. § 1961(a) and (b). If Aqua Leisure fails to make such payments as set forth in the Agreement, such conduct will be considered a violation of this Agreement and Order.

Provisionally accepted and provisional Order issued on the 11<sup>th</sup> day of October, 2012.

**BY ORDER OF THE COMMISSION:**

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Todd A. Stevenson, Secretary  
U.S. Consumer Product Safety Commission

[FR Doc. 2012-25507 Filed 10/16/2012 at 8:45 am; Publication Date: 10/17/2012]